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No. 79-1355

In the Supreme Court of the United States

OCTOBER TERM, 1979

ROSALIND A. GREENBERG, ADMINISTRATRIX,
ESTATE OF FANNIE ALPERSTEIN, PETITIONER

v.

COMMISSIONER OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

WADE H. MCCREE, JR.
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The sole question presented in this federal estate tax case is whether the decision below correctly held that the decedent's gross estate included the value of property over which she possessed a general power of appointment, as defined in Section 2041(a)(2) of the Internal Revenue Code of 1954 (26 U.S.C.), even though she was legally incompetent at all times during the existence of the power and thus unable to exercise it under local law.

The pertinent facts may be summarized as follows: Petitioner Rosalind A. Greenberg is the administratrix of the estate of the decedent, Fannie Alperstein. The decedent died intestate on December 3, 1972, five years after the death of her husband, Harry Alperstein (Pet. App. 18a). In his will, the decedent's husband established a trust for the benefit of the decedent under which she was given the right to receive the net income from the trust during her life, and the power to appoint the entire

principal of the trust in her will (Pet. App. 18a-19a). Shortly after her husband's death, the decedent was declared mentally incompetent, and the parties stipulated that from her husband's death until her own death, the decedent lacked the capacity to execute a will under New York law (Pet. App. 19a). At no time from July 6, 1967, the date of death of the decedent's husband (Pet. App. 18a), until her own death, did the decedent exercise her testamentary power of appointment (Pet. App. 19a).

Petitioner did not include the trust property subject to the decedent's power of appointment (valued at $242,167.17) in the decedent's gross estate on the federal estate tax return. On audit, the Commissioner of Internal Revenue asserted a deficiency in the amount of $89,856.21, on the ground that the decedent possessed at death a general power of appointment within the meaning of Section 2041(a)(2) of the Code, which required the inclusion of the entire value of the property in her gross estate (Pet. App. 2a, 20a).

In this suit brought by petitioner in the Tax Court for redetermination of the deficiency, the Tax Court upheld the Commissioner's position that the decedent's gross estate included the value of the trust property subject to the power of appointment. It ruled that an "exercisable" power of appointment, as that term is used in Section 2041, refers to the existence of the power on the decedent's behalf, rather than to the decedent's actual ability to exercise the power of appointment under local law at the time of death. Since the provisions of her husband's will conferred on the decedent an unlimited testamentary power to appoint the trust property, the Tax Court concluded that she was possessed of a general power of appointment within the meaning of Section

2041(a)(2), despite her inability to exercise the power under local law (Pet. App. 6a-8a). The court of appeals affirmed. It held that when an instrument confers upon a decedent a testamentary power, which by its terms can be exercised in favor of the decedent's estate, the property subject to the power is includable in the decedent's gross estate under Section 2041(a)(2) even though the decedent is unable to execute a valid will at any time after the power was granted (Pet. App. 36a).

1. The decision below correctly held that the decedent's gross estate included the value of the trust property over which she had a power of appointment. Section 2041(a)(2) of the Code provides that the gross estate shall include the value of all property with respect to which the decedent has at the time of his death a "general power of appointment" created after October 21, 1942, whether or not the power has been exercised by the decedent. Section 2041(b)(1) defines a general power of appointment as a power which is exercisable in favor of the decedent, his estate, his creditors, or the creditors of his estate. As defined by her husband's will, the decedent's power of appointment was exercisable in such a manner. Under the language of the statute, it was unquestionably a general power of appointment under Section 2041(b)(1). Accord: *Pennsylvania Bank and Trust Co.* v. *United States*, 597 F. 2d 382 (3d Cir. 1979), aff'g 451 F. Supp. 1296 (W.D. Pa. 1978), cert. denied, No. 79-490 (Dec. 3, 1979). See also *Fish* v. *United States*, 432 F. 2d 1278 (9th Cir. 1970).[1] The

[1] *Finley* v. *United States*, 404 F. Supp. 200 (S.D. Fla., 1975), upon which petitioner relies (Pet. 9-12), was reversed on the ground that the district court had no jurisdiction because the taxpayer filed a petition in the Tax Court. See *Finley* v. *United States*, 11 Fed. Taxes Est. & Gift (P-H) para. 148.383 (5th Cir. Feb. 20, 1980). The other lower court decisions cited by petitioner (Pet. 15) (*Estate of Gilchrist*

focus of Section 2041(a)(2) is on the decedent's property at the time of death. Thus, as the court in *Fish* correctly observed (432 F. 2d at 1280 n.3), if estate tax liability turned on the mental capacity of the decedent at the time of his death, the capacity of almost every donee of a power of appointment would be called into question because most people suffer some mental debilitation prior to death.

2. The decision below is also consistent with the legislative history of Section 2041. In 1942, Congress specifically amended the predecessor of Section 2041, which taxed only exercised powers of appointment. The revised statute requires the inclusion of property subject to a power of appointment whether or not the power was exercised by the decedent. See Section 403(a) of the Revenue Act of 1942, ch. 619, 56 Stat. 942.[2] Since Congress enacted special relief provisions for donees of pre-1942 powers who were under a legal disability at the time of the change in the law (Section 403(d)(2) of the Revenue Act of 1942), it is clear that it intended that a post-1942 power held by a donee subject to a legal disability would be included in the donee's gross estate. If Congress had intended to provide an exception for donees subject to a legal disability, it could easily have done so in Section 2041(b)(1), which contains express exceptions to the definition of a general power of appointment.

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v. *Commissioner*, 69 T.C. 5 (1977); *Estate of Reid* v. *Commissioner*, 71 T.C. 816 (1979), and *Williams* v. *United States*, 43 A.F.T.R. 2d (P-H) 1254 (W.D. Tex. Nov. 2, 1978)) are all pending on appeal in the Fifth Circuit.

[2]Section 403(a) amended Section 811(f) of the Internal Revenue Code of 1939 (26 U.S.C. (1952 ed.)).

3. Finally, the interpretation of the term "power of appointment" in Section 2041(a)(2) by the decision below is consistent with Section 2056, which allows an estate tax marital deduction for a property interest passing from the decedent to his spouse consisting of a life estate coupled with a general power of appointment. Section 2056(b)(5) provides that property subject to a power of appointment in the surviving spouse is eligible for the marital deduction if the power is "exercisable by such spouse alone and in all events." The Internal Revenue Service has ruled (Rev. Rul. 75-350, 1975-2 Cum. Bull. 367) that the legal capacity of the surviving spouse to exercise the power is irrelevant in determining the availability of the marital deduction under Section 2056(b)(5). If the rule were otherwise, it could never be determined whether the surviving spouse could exercise the power "alone and in all events." On the other hand, under petitioner's position, the estate of the first spouse to die may receive a marital deduction with respect to property which is subsequently excluded from the estate of the remaining spouse because of his or her incompetency, so that the property would be taxed in neither estate—a result Congress carefully sought to avoid.[3] See S. Rep. No. 1013 (Pt. 2), 80th Cong., 2d Sess. 16 (1948); *United States* v. *Stapf*, 375 U.S. 118, 128 (1963). The only reasonable solution is that adopted by the decision below and the Service's ruling, *viz.*, that the legal capacity of a person to exercise a power of appointment is irrelevant both for purposes of determining the marital deduction allowable to the donor's estate and for determining the gross estate of the donee.

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[3]Indeed, under the terms of the will of the decedent's husband (Pet. 4), the amount of property placed in trust for the decedent was contingent on the availability of the marital deduction for his estate.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

WADE H. MCCREE, JR.
Solicitor General

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